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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 206

EUGENE M. MURPHEY, JR., ET AL.,
Petitioners,

versus

M. T. REED, ET AL., a copartnership doing business as M. T. REED CONSTRUCTION COMPANY,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

WEBB M. MIZE,
Attorney for Petitioners.

BIDWELL ADAM,
ENGLISH LINDSEY,
R. W. THOMPSON, JR., admitted 1948-48
All of Gulfport, Mississippi,
Of Counsel.

American Printing Co., Ltd., 424 Camp Street

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OCTOBER TERM, 1948

No. ————

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versus

M. T. REED, ET AL., a copartnership doing business as M. T. REED CONSTRUCTION COMPANY,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

MAY IT PLEASE THE COURT:

The petition of Eugene M. Murphey, Jr. and others respectfully shows unto this Honorable Court:

A.

Summary Statement of Matter Involved.

This cause was brought by one hundred and twenty-one named plaintiffs and two intervenors (who are the

petitioners here) against the respondents to recover overtime, liquidated damages, and attorneys' fees due under Section 16(b) of the Fair Labor Standards Act of 1938; 29 USC 216(b). In 1942 the chief of the Bureau of Yards and Docks of the Navy Department entered into two cost-plus-a-fixed-fee contracts with the defendants. One of the contracts was for a construction of a navy camp for training construction battalions, commonly termed "Seabees", and a naval advance base depot at Gulfport, Mississippi. The second contract was for maintenance and operation of said advance base depot. The respondents maintained separate and distinct organizations under the two contracts. Employees working under the construction contract were designated as construction workers, and employees working under the maintenance and operation contract were known as maintenance and operation, or "M & O" employees. All employees, whether construction or "M & O" employees, were hourly employees and were paid by contractor's check. Income tax deductions and withholding tax deductions and social security deductions were made. Discharged employees were entitled to the benefits of unemployment compensation. The respondents made a report to the Mississippi Unemployment Compensation Commission when any person's employment was terminated. There was no real distinction between construction employees and maintenance and operation employees. At least fifty per cent of the employees' work was in interstate commerce, and they were engaged in interstate commerce, or in the productic . of goods in interstate commerce. More than ninety per cent of the items that were delivered to the advance base depot were from extra-state

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points of origin. Most of the goods received at the advance base depot were stored in one of seven large warehouses, or in open storage areas where the period of storage varied from a few days to a few months. A steady stream of goods was constantly flowing through the said depot.

Eighty-nine of the petitioners were employed under the construction contract. Twenty-one were construction employees during part of their employment and "M & O" employees during the remainder. Seven were "M & O" employees throughout their employment. Several plaintiffs were classified as "navy" employees. These "navy" employees were carried on the contractor's payroll and were required to sign in and out in the daily attendance record. They were compensated the same as the others. The contractor's report to the Mississippi Unemployment Compensation Commission included "navy" employees. None of the so-called "navy" employees had a civil service rating, nor were they hired through civil service, and they were not required to take an oath of office upon being employed, as is usually required of ordinary government employees.

The case was submitted to the District Court upon an agreed statement of facts, which consisted of the respondents' request for admission of facts and petitioners' answers thereto, and the testimony of one witness. From the reading of the agreed statement of facts and the testimony introduced by the petitioners a complete picture is given, and the lower court made a finding of fact and conclusion of law. The District Court entered judgment for plaintiffs, petitioners here. The Fifth Circuit Court of

Appeals reversed and remanded the judgment of the District Court, with Judge Hutcheson dissenting. The said Circuit Court of Appeals reversed on the authority of its decision in *Kennedy vs. Mason, 164 Fed. (2d) 1016.* But the judgment of the Circuit Court of Appeals in *Kennedy vs. Mason, Supra,* was subsequently vacated by the United States Supreme Court, *68 Supreme Court 1031.* Petitioners here filed a motion for rehearing, which was refused on June 9, 1948, without a written opinion.

B.

Reasons Relied On for the Allowance of the Writ.

The reasons upon which a writ of certiorari should be granted are as follows:

1. The Circuit Court of Appeals has in this case decided an important question of far-flung import, probably affecting all cost-plus-fixed-fee war contractors and many of their employees.

Kennedy vs. Silas Mason Company, 68 Supreme Court Rep. 1031.

2. The decision of the Circuit Court of Appeals in this cause is in direct conflict with the decision of the Circuit Court of Appeals in the following case:

Bell vs. Porter, 159 Fed. (2d) 117.

3. The decision of the Circuit Court of Appeals in this case is in direct conflict with the decisions of the Su-

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preme Court of the United States in the following cases:

Alabama vs. King & Boozer, 314 U. S. 1, 62 S. Ct. Rep. 43

Buckstaff Company vs. McKinley, 308 U. S. 358, 60 S. Ct. Rep. 279

Curry vs. U. S., 314 U. S. 14, 62 S. Ct. Rep. 48, 86 L. Ed. 9

Penn Dairies vs. Milk Control Commission, 318 U. S. 262, 86 L. Ed. 748, 63 S. Ct. Rep. 617.

4. There is presented here upon a complete record the important issue as to whether war workers under a cost-plus-a-fixed-fee contract are entitled to the benefits of the Wage and Hour Law.

C.

Jurisdiction.

The orignial judgment of the Fifth Circuit Court of Appeals was entered on April 7, 1948; the *per curiam* refusing rehearing was rendered on June 9, 1948.

The jurisdiction of this court is invoked under Section 240(a) of the Judicial Code as amended by Act of February 13, 1925 (Title 28 U. S. C. A. 347).

WHEREFORE, your petitioners respectfully pray that a Writ of Certiorari be issued out of and under the Seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, command-

ing that court to certify and send to this Court for its review and determination, on a day certain to be named therein, a full and complete transcript of the record and all proceedings in case No. 12,173, entitled on its docket "M. T. Reed, et al., Appellants, vs. Eugene M. Murphey, Jr., et al., Appellees" and that said Judgment of the said Circuit Court of Appeals may be reversed by this Honorable Court or in the alternative, if this Honorable Court deems the record incomplete or in need of amplification, that this cause be remanded to the District Court for reconsideration and amplification of the record in the light of such opinion as the Court may render in regard thereto, as well as the opinion of this Honorable Court in the case of *Kennedy vs. Silas Mason*, cited *supra*, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just, and for such other relief as the Court may deem proper.

WEBB M. MIZE,
Attorney for Petitioners.

BIDWELL ADAM,
ENGLISH LINDSEY,
R. W. THOMPSON, JR.,
All of Gulfport, Mississippi,
Of Counsel.

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MEMORANDUM BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

MAY IT PLEASE THE COURT:

The opinion of the Circuit Court of Appeals for the Fifth Circuit is not yet reported but is found at Page 367 of the record and was rendered on April 7, 1948. Jurisdiction of this court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (Title 28 U. S. C. A. 347).

Statement of the Case

Reference is respectfully made to "Summary Statement of Matter Involved," Supra, in the Petition for Writ of Certiorari.

This case comes before the Court upon what we believe to be a complete record, having everything in the record that was lacking in the *Kennedy case*. There was an investigation of the facts, of course, by the plaintiffs and also by the defendants and the Navy Department, and a very complete analysis and investigation made by the Wage and Hour Division of the Department of Labor, which report was later made available to all parties for study (Record 11, 12 and 15). After the said report had been made available, the defendants herein then filed a request for admission of facts based upon the Wage and Hour Division's Report, which, together with the answer thereto and the testimony of the Naval Auditor, William R. Owings, constituted the entire record in the case (Record 30, *et seq.*).

This report examined and analyzed the contracts between the defendants and the United States Government and the method of dealings between the said parties, as well as the classification and grouping of the claims of each of the petitioners herein. This investigation and findings, being independent and impartial, were accepted by petitioners and respondents as speaking the absolute truth in the matter.

Specifications of Error

1. The Circuit Court of Appeals erred in finding that commerce was not involved in this case within the meaning of the Fair Labor Standards Act law.

2. The Circuit Court of Appeals erred in holding that employees of a wartime cost-plus-a-fixed-fee contractor producing war supplies and equipment for the armed forces were not covered by the Fair Labor Standards Act.

3. The court erred in concluding that the activities carried on under the cost-plus-a-fixed-fee contract in this case was not commerce within the meaning of the Fair Labor Standards Act.

4. The court erred in concluding that the respondent was not an independent contractor.

5. The court erred in concluding that the respondent was not engaged in commerce and the production of goods for commerce.

6. The court erred in concluding that the case of *Southern Package Corporation vs. Walton, 196 Mississippi 786; 18 So. (2d) 458*, was decisive to the effect that liquidated damages were not allowable.

7. The court erred in holding that there can be no commerce in war equipment.

ARGUMENT

I.

The issues presented by this application are of tremendous public importance. We have with one exception (the question of the effect of the Act of July 2, 1940) the same issues practically as here before the Court in the case of *Kennedy vs. Silas Mason, 68 S. Ct. Rep. 1031*, decided by this Court on May 17, 1948.

Out of the immense amount of business done by the government under cost-plus-fixed-fee contracts in the recent war, there have arisen a multitude of claims like the claim of petitioners here, a large number of which are now waiting disposition in the trial courts or appellate courts, and this Court has already dealt with a large number of cases somewhat similar in nature to the case at bar in the application of the Fair Labor Standards Act and also with the question of what constitutes commerce. "Commerce" is defined in the Fair Labor Standards Act to mean "trade, commerce, transportation, transmission, or communication among the several states or from any state to any place outside thereof."

The Court has, in our judgment, settled the proposition that cost-plus-fixed-fee contractors with the government are not agents of the government and do not consequently receive any immunity or insulation in virtue of the government's sovereign immunity. *Alabama vs. King and Boozer, 314 U. S. 1, 62 S. Ct. Rep. 43, 86 L. Ed. 3, 140 A. L. R. 615; Curry vs. U. S., 314 U. S. 14, 62 S. Ct. Rep. 48, 86 L. Ed. 9; Penn Dairies vs. Pennsylvania Milk Control Commission, 318 U. S. 262, 86 L. Ed. 748, 63 S. Ct. Rep. 617.*

This Court, as well as some of the inferior courts from other circuits, have discussed the question of what is commerce. *Cf. N. L. R. B. vs. Sunshine Mining Co., 9 Cir., 110 F. 2d 780,* cert. denied, 312 U. S. 678, 61 S. Ct. Rep. 447, 85 L. Ed. 1118; *Canyon Corp. vs. N. L. R. B., 8 Cir., 128 F. 2d 953;* and *Timberlake vs. Day & Zimmerman, Inc., D. C. S. D. Iowa, 49 F. Supp. 28,* with *N. L. R. B. vs. Idaho-Maryland M. Corp., 9 Cir., 98 F. 2d 129,* and *Fox vs. Summit King Mines, Ltd., D. C. Nev., 1943, 48 F. Supp. 952. Atlantic Co. vs. Walling, 131 F. 2d 518; Hoke vs. U. S., 227 U. S. 308, 33 S. Ct. Rep. 281, 57 L. Ed. 523, 43 L. R. A., N. S., 906 Ann. Cas. 1913E, 905,* and *Caminetti vs. U. S., 242 U. S. 470, 37 S. Ct. Rep. 192, 61 L. Ed. 442, L. R. A. 1917F, 502 Ann. Cas. 1917B, 1168; United States vs. Simpson, 252 U. S. 465, 40 S. Ct. Rep. 364, 64 L. Ed. 665, 10 A. L. R. 510* and *United States vs. Hill, 248 U. S. 420, 39 S. Ct. Rep. 143, 63 L. Ed. 337; Gooch vs. U. S., 297 U. S. 124, 56 S. Ct. Rep. 395, 80 L. Ed. 522; Brooks vs. U. S., 267 U. S. 432, 45 S. Ct. Rep. 345, 69 L. Ed. 699, 37 A. L. R. 1407; Champion vs. Ames, 188 U. S. 321, 23 S. Ct. Rep. 321, 47 L. Ed. 492; Weber vs. Freed, 239 U. S. 325, 36 S. Ct. Rep. 131, 60 L. Ed. 308, Ann. Cas. 1916C, 317; Reid vs. Colo-*

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rado, 187 U. S. 137, 23 S. Ct. Rep. 92, 47 L. Ed. 108, and *Edwards vs. California, 314 U. S. 160, 62 S. Ct. Rep. 164, 88 L. Ed. 119.*

II.

The decision of the Fifth Circuit Court of Appeals in the case at bar is squarely in conflict with the case of *Bell, et al, vs. Porter, et al, 159 F. 2d 117 (7th Circuit).* If the court's decision rested on the fact that the government owned the materials during production and transportation, then it was not only in conflict with *Bell vs. Porter, supra,* but was also contrary to its own decision in *St. Johns River Shipbuilding Co. vs. Adams, 164 F. 2d 1012,* which was decided on the same day as the *Kennedy* case.

In the *St. Johns River Shipbuilding Company case,* the same court held that the construction of "Liberty Ships" under a cost-plus-a-fixed-fee contract at a government owned shipyard and using government owned materials and tools was covered by the Fair Labor Standards Act since the ships might serve commercial purposes as well as war purposes. By the application of the same line of reasoning, the petitioners here should have been covered under the Act, but the appellate court apparently thought otherwise.

III.

We believe the authorities cited under Paragraph I, *supra,* amply cover this point.

IV.

This decision by the court below, while not precisely presenting the same issue, does appear to be contrary to the ruling of this Court in the following cases: *Alabama vs. King and Boozer, 314 U. S. 1; Buckstaff Co. vs. McKinley, 308 U. S. 358; Curry vs. U. S., 314 U. S. 14; Penn Dairies vs. Milk Control Commission, 318 U. S. 361, 63 S. Ct. 617.*

Aside from this, the manner in which the contracting parties dealt with each other and regarded the contract is in our judgment conclusive upon the question of whether or not respondent was an independent contractor. See also dissenting opinion of Judge Hutcheson in the instant case (Record 379).

V.

We embrace specifications of error 5 and 7, since they are so closely akin.

The view which the court of appeals took that the goods handled at the Naval Advance Base Depot at Gulfport, Mississippi were for war and therefore expendibles, and that there could be no commerce in war, is in our humble judgment in direct conflict with the intent of Congress and in direct conflict with the meaning of the Wage and Hour Law itself. We believe that this Court, by the decisions cited *supra*, has given to "commerce" a far broader meaning and interpretation than that placed thereon by the learned court below.

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VI.

Under this point, we feel that the decision of the Mississippi Supreme Court in *Southern Package Corp. vs. Walton, 196 Miss. 786, 18 So. 2d 458*, is in conflict with *Overnight Motor Transportation Co. vs. Missel, 316 U. S. 572, 62 S. Ct. Rep. 1216*, and feel that the dissenting opinion by the learned Chief Justice of the Mississippi Supreme Court in that decision correctly states the law; that is, that the Supreme Court of Mississippi cannot state the intendment of Congress but that this lies wholly within the province of this Honorable Court.

Respectfully submitted,

WEBB M. MIZE,
400-07 Hewes Bldg.,
Gulfport, Mississippi,
Attorney for Petitioners.

BIDWELL ADAM,
ENGLISH LINDSEY,
R. W. THOMPSON, JR.,
All of Gulfport, Mississippi,
Of Counsel.